

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Complaints Against Various Licensees)	
Regarding Their Broadcast of the)	NAL/Acct. No. 200532080003
Fox Television Network Program)	File No. EB-03-IH-0162
“Married By America” on April 7, 2003)	

OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Submitted by

UNITED COMMUNICATIONS CORPORATION

Licensee of

WNYF-CA, Watertown, New York

Dated: December 3, 2004

INVESTIGATIONS &
HEARINGS DIVISION
2004 DEC - 7 A 11: 58
FCC ENFORCEMENT BUREAU

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OPPOSITION TO NOTICE OF APPARENT LIABILITY FOR FORFEITURE

United Communications Corporation ("United"), is the licensee of Class A television station WNYF-CA, Watertown, New York. United hereby opposes the above-captioned Notice of Apparent Liability for Forfeiture (the "NAL"), released on October 12, 2004,¹ and urges the Commission to rescind it promptly.

United is a signatory to the Opposition filed this date by the Fox Broadcasting Company ("Fox"). The key point which United wishes to stress in this separate pleading is that neither the FCC nor United received any complaints specifically directed at United's broadcast of the program described in the NAL. Furthermore, in United's judgment, as a television operation in the Watertown area for the past 23 years, the program did not broadcast indecent material as the FCC had defined that term prior to April 7, 2003.

¹ See *In re Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, Notice of Apparent Liability for Forfeiture, FCC 04-242 (rel. October 12, 2004) (the "NAL").

I. United's Position

United has never intentionally broadcast any material that it considered indecent. The licensee produces award-winning newscasts that dominate its market in a truly extraordinary fashion. As a general proposition, United supports high standards in broadcasting. United does not have the resources to produce 168 hours per week of original material, however. In a market the size of Watertown, economic exigencies dictate that United must rely to a large extent on the programming choices of network management. United is a small affiliate operating in a very small market, and lacks the leverage that larger group owners enjoy. Nevertheless, United would not run programming that it believed to be indecent, and as the FCC has defined that term, no matter what the demands of the network might be.

It is not necessary for United to argue that *Married by America* was necessarily in the highest taste. Such qualities are, like it or not, a function of the popularity of "reality"-based television programming. If the public regularly tuned in *en masse* to broadcasts of Italian grand opera, Fox would no doubt fill its schedule with Verdi and Puccini. The fact is that the American people *choose* to watch "reality" programming.

It may be that the FCC would like to elevate the public's taste, but this task is not one that Congress has assigned to the FCC. It is not within the agency's power to stretch the prohibition on the broadcast of indecent material so as to levy fines for the broadcast of that which is merely plebeian or earthy. Yet it would seem that that is what the Commission is doing in the *NAL*. At a minimum, the *NAL* represents a broadening of the

definition of indecency beyond that of which the agency has given the industry any notice, and with inadequate regard to the issue of local standards of decency.

II. Contemporary Community Standards

United joined with many other Fox affiliates in the Joint Opposition. In some instances, those affiliates were the target of complaints by viewers who found *Married by America* indecent. Perhaps for that reason, the FCC directed its letter of inquiry on this subject to a Fox affiliate in Tampa. NAL at ¶2. By way of contrast, WNYF-CA did not receive a single complaint from a single viewer regarding the subject program. In addition, United has been informed that the Commission received no complaints regarding United's broadcast of *Married by America*. There has been no finding that broadcast of this program violated contemporary community standards in the service area of WNYF-CA. United received no Letter of Inquiry or other communication from the Commission (prior to the NAL) regarding the subject program. There is no indication that the FCC made any effort to ascertain the nature of contemporary community standards for broadcast material in Watertown, or to ascertain whether United or anyone else had done so. In these circumstances, it is manifestly unfair for the Commission to assess a monetary forfeiture against United.

Previously, the lack of any complaint from anyone in the audience of a particular station has been held to bar adverse action against that station. In *Sagitarious Broadcasting Corp (WXRK)*, 18 FCC Rcd 22551 (2003), the Commission declined to reconsider its grant of the application for renewal of the license for station WXRK, New York for the broadcasting of allegedly indecent programming based on a complaint from a Los Ange-

les listener regarding the same programming even though the programming originated on WXRK. The Commission held that only petitioners who either reside in a station's service area or who listen to or view the station's programming have standing to complain as a "party in interest" regarding such applications.

We recognize that the statutory concept of "standing" as a "party in interest" for purposes of filing petitions to deny and similar pleadings differs from the Commission's use of complaints in connection with its enforcement authority. Nevertheless, the logical underpinnings of the *Sagittarius* decision are instructive for the instant case. If indecency enforcement properly proceeds from complaints lodged by those who have never heard or watched a single broadcast on the target station, and who can know but little about community standards in the station's service area, then the FCC should, at a minimum, have clarified that point in *Sagittarius* or elsewhere. If such clarification exists, we have not found it.

Until recently, the Commission required that an indecency complainant furnish a recording or transcript of the allegedly indecent programming. Although that standard has been relaxed somewhat, the concept remains that historically where the FCC has found a given program offensive, and therefore actionably indecent, it has done so at the instance of someone who listened to or viewed the offending programming. If no one in the service area was sufficiently exercised about the program's alleged offensiveness to write a letter of complaint, or even to call to complain, it is difficult to see how the FCC can make a judgment about the contemporary standards in that community.

In an era of Internet web sites and form complaints that are composed by advocacy

groups, the need for a complaint from an actual resident of the service area is even greater. The Commission should, in the absence of a general pronouncement that it is adopting new policies and practices in this area, not treat an indecency complaint as actionable unless the complainant heard the target station actually broadcast the program.

To do otherwise is to read "contemporary" and "community" out of the Commission's standard for broadcast indecency. The Commission's use of a small number of distant complaints about allegedly indecent programming on WNYF-CA leads to the conclusion that the FCC has created a national indecency standard without actually saying so. The United States Supreme Court has called the creation of a national standard to be "an exercise in futility." *Miller v. California*, 413 U.S. at 20 (1973). While United acknowledges that material no doubt exists of so egregious a nature that its broadcast would be considered indecent in every television market, that is not the case with respect to *Married By America*.

As noted above, no viewer of WNYF-CA's programming or resident of WNYF-CA's service area complained about the April 7, 2003 *Married By America* episode. No one called the station or wrote to WNYF-CA to object to the broadcast. No one from northern New York complained to the FCC. The only logical conclusion that can be drawn from this complete absence of protests is that the "contemporary community standards for the broadcast medium" in the Watertown, New York area were not subverted in any way by the subject program.

III. Vagueness of Standard as Applied

A related problem is that, in proposing a forfeiture against WNYF-CA, the Commission is applying an unconstitutionally vague indecency standard. The Commission has recognized that community standards are constantly changing. *Infinity Radio Licensee (WLDD)*, 19 FCC Rcd 5022 (2004). The problem lies in the means by which the FCC provided notice to United and other licensees (or rather failed to provide notice) of the agency's view of such standards so as to support a determination that the April 7, 2003 episode of *Married by America* would violate such standards. Are the applicable "contemporary community standards for the broadcast medium" to be ascertained by WNYF-CA management, who live and work in the service area? Or are they nothing more rigorous than what three FCC Commissioners may agree constitute such standards on any given day? If none of those Commissioners live in Watertown, and have no complaint from a Watertown resident, how are they to know?

True, the Commission has found that the unpixilated though brief exposure of a female breast is actionably indecent. *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, EB-04-IH-0011, released September 24, 2004. Perhaps from that decision broadcasters might possibly conclude that pixilated exposures of the same anatomical section might be actionable. However, this decision followed the *Married by America* broadcast by seventeen months. Therefore, even assuming that *Married by America* involved a similar exposure, the *Super Bowl* decision could not have given United notice that the Fox broadcast on April 7, 2003 would be considered patently offensive.

To add further to the confusion, the Commission recently released a decision regarding episodes of the NBC series “Coupling” that were broadcast on September 25 and October 2, 9 and 23, 2003. *NBC Telemundo License Co. (WRC)*, File Nos. EB-03-IH-0539, etc. (released November 23, 2004). There, the agency found that the program was filled with “sustained and repeated use of sexual innuendo and *double entendre*, with sex the constant theme of the program episodes,” and that “[t]he cumulative effect of such repeated references appears to render the material shocking, titillating, or pandering to the viewing audience.” *Id.* at ¶7. Nevertheless, the FCC held that the broadcast was not sufficiently graphic to be actionably indecent. By any measure, in United’s view *Coupling* was more graphic and more offensive than *Married by America*. If *Coupling* was not indecent, then *Married by America* should not have been problematic from a regulatory standpoint. Accordingly, the forfeiture proposed here, for a program that by comparison was less permeated with sexual material than *Coupling*, is inexplicable.

IV. Due Process Problem

The Fifth Amendment’s due process clause protects parties from being deprived of property without fair notice. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Inasmuch as the FCC is attempting to assess a monetary forfeiture against United, without having first articulated a coherent legal standard under which the broadcasting of *Married by America* would be considered indecent, the Commission now seeks to deprive United of its property without fair notice.

“Where the regulation is not sufficiently clear to warn a party about what is expected of it - an agency may not deprive a party of property by imposing civil or criminal

liability.” *General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). A monetary forfeiture is not supportable unless the regulated entity could have known of the standard with ascertainable certainty “by reviewing the regulations and other public statements issued by the agency . . .” *Id.* at 1329. The Court went on to recall: “In *Radio Athens, Inc. v. FCC*,² we held that when sanctions are drastic -- in that case, the FCC dismissed the petitioner’s application for a radio station license -- ‘elementary fairness compels clarity’ in the statements and regulations setting forth the actions with which the agency expects the public to comply.” *Id.*

Before an agency can issue sanctions for failure to comply with regulatory requirements, the agency “must have either put this language into [the regulation] itself, or at least referenced this language in [the regulation].” *United States v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998). “Where...the regulations and other policy statements are unclear, where the petitioner’s interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not ‘on notice’ of the agency’s ultimate interpretation of the regulations, and may not be punished.” *General Electric, supra*.

In determining whether a party has received fair notice for purposes of a due process analysis, the critical inquiry is whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties

² 401 F.2d 398, 404 (D.C. Cir. 1968).

to conform”³ In *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), the Court also explained that a licensee may not be penalized when the rules in question were unclear, the “agency itself struggles to provide a definitive reading of the regulatory requirements,” and the licensee’s interpretation of those rules is reasonable.⁴ No Commission statement that was available to United on April 7, 2003 would have apprised United that the FCC would deem the subject program actionably indecent.

Clearly, the Commission has struggled, and continues to struggle, with a workable definition of indecency. See, e.g., *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 32 CR 78, 19 FCC Rcd 4975, ¶12 (March 18, 2004). United does not disagree with the Commission’s ultimate disposition of the *Golden Globe* matter, but would submit that, since at least the days of George Carlin, the broadcast industry has been on notice that broadcast of the language in question there would be viewed as indecent. In contrast, there was no proper warning that the temptation scenes in *Married By America* would be considered as trespassing the line. The indecency standards, as reasonably perceived as of April, 2003, cannot, within the limits of due process, be fairly applied to the subject program.

V. Conclusion

Judging from the actual complaint record, WNYF-CA broadcast the subject program in a community in which the subject program was **not** patently offensive, consider-

³ *General Electric Co. v. EPA*, 53 F.3d 1324, 1239 (D.C. Cir. 1995).

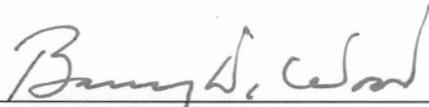
⁴ See also *Instapage Network, Ltd.*, 17 FCC Rcd 19083 (2002).

ing the “contemporary community standards for the broadcast medium.” In that light, there is no valid basis for assessment of a fine against United. At a minimum, the *NAL* represents a violation of United’s due process rights in terms of a change in the agency standard in such matters without proper advance notice.

In view of the foregoing, the *Notice of Apparent Liability for Forfeiture* against United Communications Corporation should be rescinded.

Respectfully submitted,

**UNITED COMMUNICATIONS
CORPORATION**

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Its counsel

Dated: December 3, 2004



Statement Regarding Broadcast of
Married By America on WNYF-CA
By James Corbin, Program Director

Station WNYF-CA, Watertown, New York is affiliated with the Fox Broadcasting Network. I serve as the station's Program Director. I have 25 years of experience in broadcasting in Watertown.

On April 7, 2003, WNYF-CA received an episode of the series "Married by America" via satellite from Fox, WNYF-CA simultaneously transmitted this program over the air.

We understood the nature of the "Married by America" series, where subsequent episodes were written based on input from viewers of previous episodes. The network could not likely have maintained the desired level of suspense regarding the content of those subsequent episodes if all affiliates were permitted to see those episodes before the actual broadcast. Therefore, the network gave us no opportunity to review this episode in advance, and we did not seek the opportunity to do so.

We have master control operators who monitor all programming as it is being broadcast and who have the ability to interrupt programming that may fall short of the broadcast standards of WNYF-CA. They are aware of the prohibition on the broadcast of indecent programming during times when children are likely to be in the audience. However, as of April 7, 2003 we were not aware of any pronouncement by the FCC that would have led us to believe that the April 7 episode of *Married by America* would be considered indecent. The master control operator on duty that night did not view that episode as indecent within the framework of the contemporary community standards that obtain in our market.

United Communications Corporation is sensitive to the interest of its audiences, and encourages input from viewers. As a general proposition, we receive a great many comments both positive and negative from residents of the

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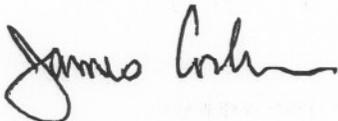
P.O. Box 210, Massena, NY 13662 ■ 315-764-5605
fox28@wwnytv.net

service area. This includes telephone calls, emails and mailed letters.

In my experience as a broadcaster, if any episode of "Married by America" were considered by viewers of WNYF-CA to be patently offensive as measured by contemporary community standards for the television broadcast medium in Watertown, then at least one of those viewers would have informed the station of his or her opinion of that effect.

Instead, WNYF-CA did not receive a single complaint, written or oral, from any of its viewers concerning any of the episodes of "Married by America."

I declare state under penalty of perjury that the foregoing is true and correct. Executed on December 3, 2004



James Corbin
Program Director